

ARTHUR MILLARD
MARY JANE MILLARD

IBLA 83-134

Decided November 7, 1983

Appeal from a decision of the Colorado State Office, Bureau of Land Management, dismissing the protest of the dependent resurvey of the north boundary of T. 38 N., R. 13 W., New Mexico principal meridian, and the tract segregation survey in T. 39 N., R. 13 W., New Mexico principal meridian, Colorado. Group No. 521, Colorado.

Affirmed.

1. Surveys of Public Lands: Generally--Surveys of Public Lands: Independent Resurveys

The first step of an independent resurvey is to reestablish the outboundaries of the area to be resurveyed, following the methods of a dependent resurvey. The second step is the segregation of lands embraced in valid claims based on the former approved plat.

2. Surveys of the Public Lands: Generally

Where a protest challenges the declaration of a survey that a corner is lost and the reestablishment of that corner by proportionate measurement, and the record shows that the Bureau of Land Management gave due consideration to evidence tendered to establish the original position of the corner, BLM may properly deny the protest and that decision will be upheld on appeal where appellant fails to establish error in the decision.

APPEARANCES: Arthur Millard and Mary Jane Millard, pro sese.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Arthur Millard and Mary Jane Millard appeal the Colorado State Office, Bureau of Land Management (BLM), decision of September 22, 1982, which dismissed their protest against the dependent resurvey of the north boundary of T. 38 N., R. 13 W., New Mexico principal meridian, and the independent resurvey of tracts of private lands located in secs. 28, 29, and 32, T. 39 N., R. 13 W., New Mexico principal meridian.

The surveys were requested by the Rocky Mountain Regional Forester, U.S. Forest Service, due to the asserted absence of evidence of the original subdivisional corners that controlled the boundaries of the national forest lands and the resulting uncertainty of these boundaries. The north boundary of T. 38 N., R. 13 W. (south boundary of T. 39 N., R. 13 W.) was established by a dependent resurvey which commenced June 8, 1965, and was completed June 23, 1969. The survey was accepted March 5, 1973.

Special instructions dated September 15, 1964, state as to T. 39 N., R. 13 W.: "The work to be executed in this township will be a retracement of a portion of the boundaries and those subdivisional lines along Stoner Creek area which is intermingled with private land." On May 27, 1980, "Additional Supplemental Special Instructions" were issued stating "the original Special Instructions are hereby amended to include the dependent resurvey of the north and east and a portion of the west boundaries and the metes-and-bounds survey of private land claims of Township 39 North, Range 13 West." Subsequently, BLM informed the individual landowners in the area by letter dated August 4, 1980, as follows:

Our land surveyor, Mr. Donald Borden, has advised me that he has completed the investigation and will begin, in the near future, the remonumentation of the boundaries of the individual private tracts and the National Forest lands.

Since we are unable to recover a very limited number of subdivisional corners, and also, since we have located major discrepancies between certain relocated corners, we feel the only way the patented tracts of land located along the Stoner Creek Drainage and the Dolores River Drainage can best be protected is by an independent resurvey.

[1] BLM stated in its September 22, 1982, decision:

The jurisdiction of the Bureau of Land Management, the limit of authority of the surveyor, and the bona fide rights of claimants, where entered or patented lands are involved, remain absolutely the same whether the resurvey is to be made upon the dependent or independent plan. Thus, where the independent type of resurvey has been adopted as more feasible, identified corners of the original survey in the immediate vicinity of lands to be segregated are employed for the control of the location of such lands (emphasis added). Section 6-42, Manual of Instructions for the Survey of the Public Lands of the United States, 1973.

The first step of an independent resurvey is to reestablish the outboundaries of the area to be resurveyed, following the methods of a dependent resurvey. The second step is the segregation of lands embraced in valid claims based on the former approved plat. Section 6-35, Manual.

The Manual of Surveying Instructions directs that where an outboundary has been reestablished by a dependent resurvey,

the subdivisions of a tract originally described as along or on opposite sides of the outboundary must agree with the line reestablished (emphasis added). Section 6-36.

The first step, the reestablishment of the outboundary affecting the Stoner Creek Tracts, was accomplished by the BLM dependent resurvey of the north boundary and a portion of the subdivisional lines of T. 38 N., R. 13 W., NMPM accepted March 5, 1973.

Due to the absence of any found original corners and the lack of reliable control within the township near your land, the found or reestablished original corners on the south boundary of T. 39 N., R. 13 W. (common with the north boundary T. 38 N., R. 13 W.), were used to control the establishment of the angle points for Tracts 41, 42 and 43.

Ms. Millard owns the SE 1/4 NW 1/4 and NE 1/4 SW 1/4 sec. 28, T. 39 N., R. 13 W. This is a portion of the land patented in homestead entry patent 51186, dated March 11, 1909, and is the east half of redesignated "Tract 41" in the BLM tract segregation survey. Mr. Millard owns a large percentage of the SE 1/4 NW 1/4, the NE 1/4 SW 1/4 and the W 1/2 SW 1/4 sec. 32, T. 39 N., R. 13 W. This land, patented in homestead entry patent 711, dated March 25, 1902, was redesignated "Tract 43" in the BLM tract segregation survey.

Review of appellants' statement of reasons on appeal reveals their concern with the placement of the southwest corner of sec. 32. They believe that BLM has placed that corner "over 100 ft. east of previously accepted surveys" (Statement of Reasons at 1). Appellants claim BLM's placement of that corner on the east bank of Stoner Creek rather than the west bank will cause extreme hardship "in fencing lengthwise of a stream that floods every spring, of relocating fences extremely difficult to build on steep canyon walls, of preventing use of irrigated field lands used since the time of the patents, and of necessitating lengthy negotiations with adjacent landowners" (Statement of Reasons at 1).

Appellants also discuss at length why they believe that BLM failed properly to set the southwest corner of sec. 32. They indicate that bottom land to the west of Stoner Creek had been entered and fenced. Appellants express concern about certain calls in the field notes relating to the tract segregation survey. In addition, they state:

j. The intent of the original patents was to include the bottom land, which in Stoner Creek was little enough to make a living on. Agriculture was the intent. The original owners of the patents knew on the land what they had to homestead, to clear, level, protect from the spring floods, to irrigate and raise food or pasture or hay on. It was not entirely their fault that they could not get a more correct description of the land. They were probably told it had to be in 40 acre squares when ten acre squares would have been better.

(Statement of Reasons at 5).

Appellants suggest the following as the way to solve the problems they perceive as having been created by the surveys:

[T]hat all longitudinal lines for Tracts 41, 42 and 43 be moved west the same distance to agree with the earlier surveys, all of which started from the only known original stone in the vicinity, the Township corner. This distance is the south line of Section 31 as recorded in the original Township plat, subtracted from that of the 1980 protested survey hereby being appealed. Or, to move only the west line of Section 32 west by that amount and set the west line of the East half of "Tract 41" on the fence line. The remaining two serious problems of the Tract 42 field and the upper fence of the East half of "Tract 41" would then have to be solved by amendment of patents or exchanges with the USFS.

(Statement of Reasons at 6).

Although appellants' appeal addresses Tracts 41, 42, and 43, the record indicates that Joe and/or Tony Schwann are the owners of Tract 42 and part of Tract 41. In its response to appellants' protest, BLM represented that the Schwanns were satisfied with the survey. On appeal appellants characterize BLM's representation as "misleading." Appellants state that they know the Schwanns and that

they don't live here and simply cannot afford to get involved in lengthy research and litigation on property rights matters; they need very much to gain title to the large triangle of irrigated field land near the homestead house; they do not need the pine timber over halfway up the canyon wall to Stoner Mesa above that house.

(Statement of Reasons at 5).

Appellants' representation concerning the Schwanns is not confirmed by the record, however. In a letter received by the Board on June 1, 1983, Tony Schwann sought to check the status of this case and stated therein "[w]e are indeed most pleased to finally know precisely where these boundaries lie."

We will first examine the question of the location of the corner of secs. 5, 6, 31, and 32, Ts. 38 and 39, N., R. 13 W. Having determined that such corner was lost because there was no local physical evidence to determine the original position, the surveyor resorted to an east-west proportionate measurement to control the longitudinal position. Appellants object to the location of the reestablished corner as being approximately 100 feet further east than the original corner.

The question presented is whether the surveyors properly determined that the original southwest corner of sec. 32 was lost. 1/ Examination of

1/ A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from

the field notes of that survey reveal that the surveyors found the original corner monument for the corner of secs. 4, 5, 32, and 33, 2/ and also the quarter section corner of secs. 5 and 32. 3/ The surveyors could not locate any physical evidence of the southwest corner of sec. 32 and determined the corner "latitudinally by old fence line, extending E., and longitudinally by proportionate measurement" (Field Notes at 6). They did locate the original quarter section corner of secs. 6 and 31.

[2] Clearly, the original corner monument for the southwest corner of sec. 32 no longer exists. However, appellants' assertions raise the question of whether the original corner may be considered an obliterated corner. 4/ Our review of the record convinces us that the corner could not be considered obliterated and that the surveyors properly determined the corner to be lost. BLM stated in its September 22, 1982, decision that the determination that the corner was lost was made after contacting "all of the local landowners, including Merwyn Akin and yourselves, and exhausting every other means to determine the original position" (Decision at 2). Appellants dispute this claim on appeal stating that "[n]either Mary Jane Millard, Arthur Millard, or Merwyn Akin were consulted and we had all the knowledge we have now (Statement of Reasons at 2). Regardless of whether appellants' assertion is true, none of the information contained in the statement of reasons is persuasive that the corner in question should have been considered an obliterated corner.

BLM adequately explained its reason for considering the corner lost and for rejecting appellants' evidence when it stated:

All the information that you presented was considered prior to the acceptance of this survey on March 5, 1973. No evidence was presented, however, concerning the location of the original

fn. 1 (continued)

acceptable evidence or testimony that bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners. Manual of Instructions for the Survey of the Public Lands of the United States (Manual) (1973), 5-20 at 133.

2/ The Field Notes state at 5: "The cor. of secs. 4, 5, 32 and 33, monumented with a decayed wood stake, set in mound of stone. This position is harmoniously related to a long established fence line to W. and S."

3/ The Field Notes state at 5: "The 1/4 sec. cor. of secs. 5 and 32, monumented with the original sandstone, 3 x 8 x 10 ins., mkd. 1/4 on N. face, firmly set in the ground."

4/ "An obliterated corner is one at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated, or the point for which may be recovered beyond reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence.

"A position that depends upon the use of collateral evidence can be accepted only as duly supported, generally through proper relation to known corners, and agreement with the field notes regarding distances to natural objects, stream crossings, line trees, and off-line tree blazes, etc., or unquestionable testimony."

Manual 5-9 at 130.

corner, and the procedure you suggested of merely going record distance east from the SW township corner could not be accepted because this would have ignored the 1/4 corner of sections 6 and 31 and the long-accepted corner of sections 4, 5, 32 and 33. This would have been in direct disregard of sections 5-23, 24 and 30 of the Manual, where it directs that relative weights should be given to all parts of the line between two identified corners. In this case there was an excess between the two found corners, leaving the width of the west 1/2 of the south boundary an excess from record of 1.18 chains. Because no original or collateral evidence could be developed, the corner was declared lost, and the surveyor turned to a proportionate measurement which harmonized proper surveying practice with legal and equitable considerations.

On October 22, 1980, you wrote a letter to this office transmitting an affidavit from Mr. Merwyn Akin, dated August 1980, now stating that he had seen the original corner stone at some distance west of Stoner Creek. In this affidavit Mr. Akin was able to describe the original location of the southwest corner of section 32 only in very general terms. He states that the stone "would have had to be at least one hundred feet, probably more, up to two hundred feet west of the brass cap at the northeast corner of the highway bridge."

Although this type of information was not offered in 1965 when the BLM surveyor spoke with Mr. Akin, it has now been considered. After carefully reading your testimony, it appears that you do not claim ever personally to have seen this original stone.

Sections 5-5 through 5-16 of the Manual give direction to the BLM surveyor concerning the use of testimony of witnesses or original topographic calls to assist in restoring the location of obliterated corners.

* * * * *

A corner is not considered lost if its position can be recovered satisfactorily by means of the testimony and acts of witnesses having positive knowledge of the precise location of the original monument. Section 5-10. The testimony must be sufficiently accurate, within a reasonable limit, for what is required in normal surveying practice. Section 5-11.

Although the character of Mr. Akins testimony cannot be questioned, his ability to describe the precise location within a reasonable limit of accuracy, beyond reasonable doubt, has not been demonstrated.

Corroborative evidence becomes necessary in direct proportion to the uncertainty of the statements advanced. Section 5-11. The accuracy of the original topographical call to Stoner Creek made by Mr. Gove, the original surveyor, along the south boundary of section 32 is highly questionable due to the gross differences

appearing in a significant number of other cases. For example, when allegedly subdividing the township, he calls for crossing Stoner Creek just south of the northeast corner of section 32. Although this corner could not be found, a protracted position for this corner from the south boundary shows that Stoner Creek really falls nearly 1/2 mile to the west. Plotting Tract 42 on the original plat shows that if the original topographical calls to Stoner Creek are employed, Stoner Creek would not even flow through the tract. These facts do not convince me that the use of Mr. Gove's topographical calls as positive collateral evidence to reestablish corners is highly reliable. The Manual directs that in questionable cases it is better practice, in the absence of other reliable collateral evidence, to turn to the suitable means of proportionate measurement. Section 5-16.

(Decision at 3-4).

Thus, BLM found that the original surveyor's topographic call establishing the corner on the west bank of Stoner Creek was not highly reliable collateral evidence such as to justify the conclusion that the corner was obliterated, rather than lost. Nothing asserted by appellants on appeal establishes that BLM's conclusion was in error.

With respect to the tract segregation survey of Tracts 41 and 43, appellants, likewise, have failed to establish any error with that survey. Appellants suggest that the survey should follow established fence lines. Fence lines, however, do not necessarily control survey boundaries, and, as stated by BLM in its decision, in describing the effect of accepting certain fence lines in Tract 41, "[i]f these fences had been accepted, it would have meant an additional 32 acres over the 80 acres described by the original patent" (Decision at 6).

We conclude that BLM properly rejected appellants' protest to the reestablishment of the southwest corner of sec. 32 and to the tract segregation survey, and that BLM fully and adequately responded to the contentions raised by appellants.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

